UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **VISA U.S.A. INC., VISA INTERNATIONAL CORP.,AND MASTERCARD INTERNATIONAL INCORPORATED,** **Defendants.**	**98 Civ. 7076 (BSJ)** **MEMORANDUM OF THE UNITED STATES OF AMERICA IN OPPOSITION TO VISA U.S.A.'S MOTION TO COMPEL DISCOVERY**

Introduction

Plaintiff United States of America (hereafter "the Government") submits this memorandum in opposition to Visa U.S.A.'s (hereafter "Visa") motion to compel the Government to produce: (1) the Government's memoranda from interviews it has conducted; and (2) economic analyses performed for the Antitrust Division by economic experts.[1] These

[1] Visa also briefed a third issue: the discoverability of the list of persons the Government interviewed in connection with its pre-complaint investigation. The Government initially declined to provide this information to the defendants, on the grounds that the information is privileged work product, *Massachusetts v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986) (holding production of names of persons interviewed improper as distinguished from list of persons with knowledge); *Board of Educ. of Evanston Township v. Admiral Heating and Ventilating, Inc.*, 104 F.R.D. 23 (N.D. Ill. 1984) (same), and because the identity of some of the persons interviewed is entitled to protection because they are confidential informants. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *Cullen v. Margiotta*, 811 F.2d 698, 715-16 (2d Cir. 1987). In order to expedite discovery in this case, however, the Government has nevertheless agreed to provide the defendants with a list of people it interviewed who are not confidential informants, in exchange for the defendants' agreement that such production is without waiver of any privilege or work product protection, and without prejudice to any other issue or argument. The Government is providing this list to the defendants notwithstanding *the defendants' explicit*

materials are protected from discovery under the Federal Rules of Civil Procedure as well as the common law work product doctrine and deliberative process privilege. To compel their production would not only directly contravene long established legal precedent but would also substantially impede the ability of the Antitrust Division to perform its investigative and prosecutorial functions. Visa's motion should therefore be denied.

The materials that Visa seeks fall into two generic categories. The first category consists of memoranda of interviews conducted by the Antitrust Division in the course of its pre-complaint investigation of this matter. These documents were prepared by the Antitrust Division in anticipation of litigation and so constitute work product. Moreover, in large measure the notes reflect the "opinions" of counsel and, to the extent the memoranda include non-opinion work product, that material is inextricably intertwined with the most sensitive — and undiscoverable — strategic and legal analysis.

Visa advances no good justification for compelling production of the Government's work product, including its opinion work product. Far from being able to demonstrate that it has some "special need" for the Government's work product, Visa can articulate *no* reason to believe that the information is unavailable to it. Moreover, given that this case concerns *the defendants' and their members' own conduct*, there is no conceivable basis to claim that Visa needs special access to the Government's files.

The second category of materials consists of memoranda prepared by the Antitrust Division's economists. As Visa concedes, Federal Rule of Civil Procedure 26 clearly specifies the appropriate scope of expert discovery. To the extent the discovery relates to expert testimony

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refusal to produce a comparable list of their pre-complaint interviewees.

that the government may offer, the defendants will obtain it at the time established in the Court's scheduling order. To the extent the materials were prepared by non-testifying experts, they are protected from discovery absent extraordinary circumstances, which are notably absent here. In addition, most of these materials were prepared for the specific purpose of enabling the Assistant Attorney General to decide whether to bring the claims now before this Court. They are thus unquestionably protected from discovery by the Government's deliberative process privilege. Visa presents no showing of need — let alone extraordinary need — to justify it rummaging through the Government's internal, strategic analyses.

Visa's arguments are at odds with the reasoning of long-established Supreme Court and other precedent. Visa contends that in this case the normal procedural rules and privileges should be abrogated because the plaintiff happens to be the Government. But the Government is quite commonly the plaintiff in civil litigation, and the Federal Rules of Civil Procedure are no less applicable in such cases. To the contrary, the case law and the rules themselves leave no doubt that the rules of procedure and privilege apply with at least equal force to government enforcement actions. Indeed, the deliberative process privilege is specifically designed to protect the very type of internal government analyses that is at the core of Visa's misguided motion.

Finally, Visa contends that it is entitled to this extraordinary discovery because the Government advances "extraordinary" legal theories. Even if the Government's legal theories were novel, there is no exception to Rule 26 or the deliberative process privilege for "precedent-setting" cases. But the reality is that it is Visa, not the Government, that is advancing unprecedented legal theories in an attempt to circumvent well-established legal rules and as a

pretext to advance arguments prematurely regarding the substance of the case.[2] The Government requests that this Court dispose quickly of those arguments and deny Visa's Motion to Compel.[3]

I. Visa Is Not Entitled to Discover the Government's Witness Interview Memoranda

Visa is seeking access to memoranda for each interview that the Government conducted during the extensive investigation leading up to the filing of this case. These memoranda are quintessential work-product material, and Visa has failed to offer even a minimal justification for their disclosure. The Government has already agreed to identify the individuals that it interviewed during its investigation [4] — about 115 of whom are or were affiliated with the defendants or their

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[2] Visa continues to assert that the Government's case is novel. That assertion is wrong. The Government has alleged that competition among general purpose card networks has been substantially reduced by the failure of the two leading networks to compete with each other and the agreement among defendants' member banks to erect insurmountable barriers to any U.S. bank's dealing with competitors such as American Express or Discover/Novus. This is hardly an "extraordinary" theory; indeed, as described below, *see* n.37, Visa successfully advanced significant portions of it in prior litigation with the full testimonial support of its senior management and expert economist. *See, e.g.*, Complaint ¶¶ 60, 61, 64, 98; Testimony of Dr. Richard Schmalensee at 2315-2321 (attachment 1 hereto).

[3] Visa's innuendo, conveyed largely through appended newspaper articles, that this case was brought for political reasons is entirely without basis and does not warrant extended response. The Government decided to file this case solely because it concluded, after an extensive investigation, that the defendants' conduct has harmed competition among general purpose card networks to the detriment of consumers.

[4] The Government is withholding a small number of memoranda because they would reveal the identity of confidential informers. (Declaration of Mary Jean Moltenbrey ("Moltenbrey Dec.") ¶10.) The government informer's privilege allows the government to protect the identities of persons who provide information to the government with the expectation of confidentiality. *Roviaro*, 353 U.S. at 59; *Cullen*, 811 F.2d at 715-16. While the privilege is not absolute, it protects from disclosure an informant's identity "unless the informant's testimony is shown to be *material* to the defense." *United States v. Saa*, 859 F.2d 1067, 1074 (2d Cir. 1988) (emphasis added). To overcome the privilege, the defendant must establish that the information sought is both relevant and essential to its case, and that its need for the information outweighs the need for secrecy. *Cullen*, 811 F.2d at 715-16; *see United States v. Fields*, 113 F.3d 313, 324 (2d Cir. 1997); *see also In re United States*, 565 F.2d 19, 22 (2d Cir. 1977) (explaining that strength of

members. Visa has offered no explanation why it cannot interview or depose these individuals if it so chooses; instead, it is simply attempting to gain unfair advantage in this litigation by invading the Government's trial preparation and strategies. Permitting Visa to so infringe on the Government's legitimate privileges would have a substantial and prejudicial impact on the efficacy of future Government investigations because Government attorneys would be discouraged from memorializing their interviews for fear of disclosing their strategies or otherwise disadvantaging their litigation position.

A. The Government's Interview Memoranda are Protected Work Product

The "work product" doctrine shields from discovery analytical and factual materials prepared (1) "by or for another party or by or for that other party's representative" and (2) "in anticipation of litigation or for trial."[5] The doctrine seeks to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries."[6] If work product were discoverable, "'much of what is now put down in writing would remain unwritten,' for fear that the attorney's work would

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the privilege is greater in civil litigation than in criminal). Visa has not even begun to make such a showing.

[5] *United States v. Nobles*, 422 U.S. 225, 238 (1975); *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed.R.Civ.P. 26(b)(3). Factual attorney work product is discoverable "only upon a showing of substantial need of the materials and inability, without undue hardship, to obtain their substantial equivalent elsewhere." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998). As we discuss *infra*, "opinion" work product receives "special treatment not accorded factual material" and is protected from discovery unless the party seeking production makes a "highly persuasive showing."

[6] *Adlman*, 134 F.3d at 1196 (quoting *Hickman*, 329 U.S. at 510-11).

redound to the benefit of the opposing party."[7]

The interview memoranda prepared by representatives of the Government clearly constitute both opinion and factual work product. During the course of this investigation, Government attorneys, accompanied by economists and legal assistants, conducted interviews of approximately 180 industry participants. The purpose of these interviews was to garner evidence to allow the Government to make an informed decision whether to charge the defendants with violations of the antitrust laws as well as to prosecute the defendants in the event that the Government did file suit. (Moltenbrey Dec. ¶¶ 4-6).

The Government prepared an interview memorandum ("Memorandum") after almost every interview that it conducted during the investigation.[8] The Memoranda generally consist of summaries of the Government's understanding of the information obtained during the interviews, with emphasis on the specific issues of interest to the Division's legal analysis. (Moltenbrey Dec. ¶¶ 8-9). In addition, the Memoranda often summarize the reasons the Division conducted the interview, characterize the importance of the information learned in the interview, draw inferences based on that information, describe the authors' impressions concerning the cooperativeness, credibility, or knowledge of the interviewee, and/or identify potential areas of further inquiry. (Moltenbrey Dec. ¶¶ 8-9). The Memoranda thus provide a snapshot of the mental impressions of the Government personnel attending the interviews.

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[7] *Id.* at 1197 (quoting *Hickman*, 329 U.S. at 511).

[8] Sometimes one of the attorneys conducting the interview drafted the Memorandum. Other times, legal assistants, or economists who attended the interviews with attorneys prepared preliminary drafts, usually with instruction from the attorneys regarding what to include. In those instances, one or more attorneys would review and edit drafts of the Memorandum. (Moltenbrey Dec. ¶ 7).

Such memoranda are classic examples of work product that is protected from disclosure during discovery. Indeed, the seminal Supreme Court work-product cases — *Hickman v. Taylor* and *Upjohn Co. v. United States* — protected from disclosure *attorney interview notes*, the very type of work product at issue here.[9] "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes" in that the "'statement would be [the attorney's] language, permeated with his inferences.'"[10]

Visa seeks to avoid this case law by claiming that the memoranda at issue were not prepared in anticipation of litigation and thus cannot be work product. But the Second Circuit has taken a "flexible approach . . . , asking not whether litigation was a certainty, but whether the document was created 'with an eye toward litigation.'"[11] Documents are deemed prepared "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[12] Once the factual showing is made that an investigation is being

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[9] *Hickman*, 329 U.S. at 510; *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[10] *Upjohn*, 449 U.S. at 399-400 (quoting *Hickman*, 329 U.S. at 513, and 516-17 (Jackson, J., concurring)). Similarly, in *SEC v. Downe*, 1994 WL 23141 at * 2 (S.D.N.Y.), the court found that "notes of an attorney concerning witness interviews are precisely the type of materials that the Supreme Court identified in *Upjohn* as deserving special protection." The court further explained that "[a]n even stronger showing is required to obtain discovery of attorney work product based on oral statements of witnesses since such documents are likely to reveal the attorney's mental processes." *Id*.

[11] *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994) (quoting *Hickman*, 329 U.S. at 511).

[12] *Adlman*, 134 F.3d at 1202 (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994)).

conducted in anticipation of litigation, documents "submitted before any final decision is made as to the course [of] an investigation qualify as documents prepared in anticipation of litigation" even if the investigation had been closed.[13] The memoranda at issue here are squarely covered.

In support of its argument to the contrary, Visa cites only *SEC v. Thrasher*.[14] In *Thrasher*, however, the Government had failed to adequately support its assertion of work product protection. Courts in the Southern District have repeatedly denied access to Government attorney memoranda under the work product doctrine where, as here, the Government by way of declaration supports its assertion that its pre-complaint interview memoranda were prepared to assist "the determination whether to proceed with litigation."[15] For example, in *SEC v. Cavanagh*, explicitly distinguishing *Thrasher*, the court held that interview memoranda "fall squarely within the protections of the work-product doctrine."[16] Similarly, in *SEC v. Downe*,[17] the court held that the "existence of an active investigation . . . is strong circumstantial evidence that the agency lawyer prepared the document with future 'litigation in mind.'"[18]

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[13] *A. Michael's Piano*, 18 F.3d at 146 (interpreting Freedom of Information Act ("FOIA") exemption 5).

[14] 1995 WL 46681 (S.D.N.Y.).

[15] *SEC v. Cavanagh*, 1998 WL 132842 at *2 (S.D.N.Y.).

[16] *Id.*

[17] 1994 WL 23141 at *2 (S.D.N.Y.).

[18] According to *Downe*: "A law enforcement agency [must show] that one of its lawyers prepared a document in the course of an investigation that was undertaken with litigation in mind. Such an investigation would have to be, and typically would be, based upon a suspicion of specific wrongdoing and represent an attempt to garner evidence and to build a case against the suspected wrongdoer." *Downe*, 1994 WL 23141 at * 2 (quoting *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991)). Moreover, the opinion in *Thrasher* is premised upon a standard for determining what constitutes "anticipation of litigation" that was later rejected by the Second

B. Visa Has Not Shown Sufficient Need To Overcome Work Product Protection

Visa argues that even if the Government's interview memoranda are work product, they are "factual" work product and Visa is entitled to discover them because it has a substantial need and is unable to obtain substantially equivalent information without undue burden. Visa is wrong on both counts.

First, to the extent these memoranda do recite facts, they invariably reveal their authors' opinions as to which facts were relevant to the Government's investigation. (Moltenbrey Dec. ¶ 8). Visa's suggestion that interview memoranda are analogous to deposition transcripts that simply record the statements given by a witness — and that it is inconsistent for the Division to produce transcripts but not its interview memoranda — is directly contrary to the extensive body of case law upholding claims of work product privilege with respect to such memoranda. Courts have consistently recognized that "an attorney's selection or narration of facts tends to reveal his mental processes. An attorney's notes regarding an interview, in particular, reflect 'what he saw fit to write down regarding witnesses' remarks' and thus are 'permeated with his inferences.'"[19]

Circuit. *Cf. Thrasher*, 1995 WL 46681 at *2 (repeatedly quoting *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 304 (S.D.N.Y. 1991)) *with Adlman*, 134 F.3d at 1198 & n. 3 (noting *Valley Nat'l Bank's* reliance on an incorrect test).

[19] *Downe*, 1994 WL 23141 at *4 (quoting *Upjohn*, 449 U.S. at 399-400); *see Tribune Co. v. Purcigliotti*, 1998 WL 175933 at *4 (S.D.N.Y.) ("While the Memoranda in question do convey facts — they recount what occurred during hearings before the board — those facts are intertwined with and colored by the attorneys' perceptions of and opinions on those facts . . ."). In contrast, the cases cited by Visa involved memoranda that were merely "abbreviated" versions of what a witness said. *See In re John Doe Corp.*, 675 F.2d 482, 492-93 (2d Cir. 1982)*; SEC v. Thrasher*, 1995 WL 46681 (S.D.N.Y.) & 1995 WL 92307 (S.D.N.Y.). As described above, however, the memoranda at issue here are not mere summaries.

The memoranda thus reflect opinion work product[20] which is accorded "special treatment" and is protected unless "a highly persuasive showing is made."[21]

Visa not only has utterly failed to make this showing, it has failed even to demonstrate the type of special need and undue burden that would entitle it to obtain purely factual work product. The cases Visa cites involved circumstances in which witnesses were unavailable to a party because of, for example, a Fifth Amendment privilege claim[22] or because the attorney's notes constituted first-hand evidence of an event directly relevant to either a cause of action or defense.[23] Here, Visa merely speculates that because the Government's thorough pre-complaint investigation lasted several years, some witnesses may be hard to find, or may not recall the

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[20] That some of the memoranda were initially drafted by legal assistants or economists is irrelevant. The work product doctrine extends to material prepared by a party or a "party's representative," including attorneys and agents. Fed.R.Civ.P. 26(b)(3); *Nobles*, 422 U.S. at 238-39. Documents prepared by Division attorneys, legal assistants, and economists clearly satisfy this criterion. *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 444-45 (S.D.N.Y. 1990) (paralegal notes); *Davis v. FTC*, 1997 WL 73671 at *3 (S.D.N.Y.) (economist's memoranda).

[21] *Adlman*, 134 F.3d at 1197, 1204. Visa's proffered solution of redacting opinion work product is not feasible. Fact and opinion are intertwined; it simply "would not be possible to separate out those parts that are factual from those that disclose theories and thought processes in a way that would not distort the witnesses' statements." *National Union Fire Ins. Co. v. AARPO*, 1998 WL 823611 at *1 (S.D.N.Y.); *see Local 3 v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988) (redaction would make memoranda "either nonsensical or perhaps too illuminating of the [Division's] deliberative process"); *Adlman*, 134 F.3d at 1204 n.7 (refusing to redact factual portion of work product memorandum).

[22] *See In re: John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (ordering production of attorney interview notes where substantial showing that notes were the *only* available evidence of what witnesses knew, and when); *Thrasher*, 1995 WL 46681 at *7-9 (same, where notes constituted "only ready source of information" for SEC's case in that the knowledgeable persons were either dead or asserting their 5th Amendment rights).

[23] *United States v. Weissman*, 1995 WL 244522 at *13 (S.D.N.Y.) (attorney's notes of meeting attorney attended where statements allegedly were made that constituted basis for establishing that joint defense privilege existed and was not waived).

substance of their interviews with the Government. Such speculation is entirely inadequate to justify wholesale disclosure of the Government's work product.

Visa's claim that disclosure of the Government's work product would obviate the need for many depositions and enable them to be ready for trial much sooner is equally insufficient. As the court held in *Downe*, the "burden of deposing the many witnesses" the government interviewed during its investigation "plainly falls short" of the showing required under *Upjohn*.[24]

This case centers around Visa's own conduct, as well as that of its members and co-defendants. Most of the people interviewed by the Government in its investigation are or were officers and employees of the defendants, or officers and employees of the defendants' member banks. (Moltenbrey Dec. ¶ 6). If anything, these individuals are likely to be far more available to Visa than they have been to the Government.[25] Moreover, the parties agreed to a scheduling order that provides the parties with over a month after receiving the other sides' trial list to depose any witnesses that it missed during the normal discovery period precisely to ensure that the parties are not compelled to depose every possible witness during the initial discovery period. Visa has succeeded in extending the pre-trial discovery period so that there still remains over a year before trial. Surely Visa now has sufficient time to investigate its, and its member banks,' own actions. Visa simply does not need the Government's interview notes when it will have the

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[24] *See Downe*, 1994 WL 23141 at *3.

[25] When it is convenient, Visa not only recognizes that it has superior access to most of these individuals, it emphasizes the fact. In negotiations over its own document production, counsel for Visa has taken the remarkable position that it has an attorney-client relationship with the over 6,000 member banks within the Visa association, and that its communications with them are privileged. When both of its meritless positions are read together, Visa is in effect arguing that it would be unduly burdensome to expect it to interview its own clients.

chance to take the depositions it chooses.[26]

II. Materials Prepared for the Antitrust Division by Expert Economists Are Not Discoverable

The Government understands that Visa is seeking production of substantive analyses prepared by the Government's economists that contain factual analyses of any of the issues in this case, or conclusions that would be "exculpatory" because they would support positions advocated by one or more defendants. Defendants are not entitled to discovery of any of these materials because they are privileged work product and either exempt from discovery, or discoverable only at a specified time pursuant to the specific requirements of Rule 26(b) and the scheduling order agreed to in this case. In addition, documents prepared by Antitrust Division economists are protected from discovery under the deliberative process privilege.

A. Under Fed. R. Civ. P. 26(b) Visa is Not Entitled To Discovery of the Work Product of the Government's Expert Economists

The Antitrust Division employs a large number of economists who assist attorneys conducting investigations and litigating antitrust cases by performing economic analyses or preparing expert testimony. In addition, the Antitrust Division frequently retains outside economic consultants to provide expert economic analysis and prepare expert testimony for specific investigations or cases. The analyses prepared by these economists is work product, and discovery of those analyses is expressly governed by Rule 26(b) of the Federal Rules of Civil Procedure.

Rules 26(b)(2) and 26(b)(4)(A) govern discovery of persons who "have been identified as a person whose opinions may be presented at trial." The rules specify the information that must

[26] *See Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 12 (2d Cir. 1989).

be provided by such an expert in the form of a report, and permit depositions of the expert only after the report has been produced. The stipulated scheduling order in this case provides that expert witnesses will be identified and expert reports produced on November 12, 1999. In this case, the Government has retained an outside economist as a possible testifying expert. If the Government decides to offer this or any other economist as an expert witness, it will notify defendants of that decision as required by the Court's scheduling order, and they will be entitled to conduct discovery of the bases for that expert's opinions at the appropriate time. Allowing Visa to conduct its discovery of a potential testifying economic expert now would undermine the purposes of, and the explicit procedures set forth in, Rule 26(b).

In addition to its outside economist, a number of economists who are employees of the Antitrust Division analyzed competition among general purpose card networks during the course of the Government's investigation. These economists are non-testifying experts within the meaning of Rule (26)(b)(4)(B). That rule specifically prohibits the discovery in a civil proceeding of the analyses of non-testifying economic consultants except in very narrow circumstances. Rule 26(b)(4)(B) permits such discovery only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

"The party 'seeking disclosure under Rule 26(b)(4)(B) carries a heavy burden' in demonstrating the existence of exceptional circumstances."[27] Exceptional circumstances exist where there are no other experts on the subject available, or where some unusual circumstance

[27] *Ager v. Jane C. Stormont Hosp. & Training School for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980) (citing *Hoover v. United States Dept. of Interior*, 611 F.2d 1132, 1142 n. 13. (5th Cir. 1980)).

enables one party's expert to observe an important object or condition that was simply not "observable by an expert of the party seeking discovery."[28] The party seeking discovery must show "a basic lack of ability to discover the equivalent information"[29] or the inability otherwise "to obtain equivalent information essential to case preparation."[30] Visa does not and cannot claim that no other experts exist or that it is unable to conduct its own analysis. Indeed, it admits in its memorandum that it has hired economic consultants that have conducted their own analyses. (Memorandum of Law in Support of Visa U.S.A. Inc.'s Motion to Compel ("Visa Mem.") at 13-14.) Visa thus has no legitimate basis on which to compel the Government to produce the analyses of non-testifying experts.

Conceding that discovery of the Government economists' analyses is protected work product under Rule 26(b)(4)(B) (Visa Mem. at 12), Visa takes the novel position that an "exceptional circumstance" exists here because the Government, rather than a private litigant, filed the case.[31] Visa further argues that the Court should suspend the normal operation of Rule

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[28] *Delcastor v. Vail Assoc., Inc.*, 108 F.R.D. 405, 409 (D. Colo. 1985) (finding exceptional circumstances where the defendant's expert was able to inspect the site of a mudslide that was the basis of the lawsuit on the day after the slide occurred).

[29] *Eliasen v. Hamilton*, 111 F.R.D. 396, 401 (N.D. Ill. 1986); *Delcastor*, 108 F.R.D. at 409.

[30] *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd Partnership*, 154 F.R.D. 202, 208 (N.D. Ind. 1993). According to Wright and Miller, "[t]he burden on the moving party is to show circumstances such that it cannot get any facts or opinions on the subject in which it is interested," and that it was "deliberately intended by the draftsmen of the 1970 amendment" to Rule 26 that litigants would "rarely" be able "to make the required showing." 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure Civ. 2d § 2032 (1994).

[31] Visa also argues that because it provided some of its own economic analysis to the Government in an effort to convince the Government not to file this action, it would be unfair not to give it access to the Government's economic analysis. (Visa Mem. at 13-14). Visa *voluntarily*

26(b)(4)(B) in this case and compel the production of this otherwise undiscoverable material pursuant to *Brady v. Maryland*.[32]

Visa's arguments are entirely unsupported by logic or law. *Brady* held that due process requires the Government to disclose material, exculpatory information to *criminal* defendants.[33] The notion that *Brady*, which existed at the time of the adoption of the amendment embodied in Rule 26(b)(4)(B), renders the Rule inapplicable to the Government is patently wrong and was explicitly rejected in a 1992 decision by Judge Leisure.[34] Other courts have consistently applied Rule 26(b)(4)(B) where an opposing party has sought discovery from the Government's non-testifying experts without even mentioning the possibility that the rule might not apply to the Government.[35] As the court observed in *Martin*, there is "no legal authority . . . for the proposition that the Brady rule deprives the Government in a civil action of the protection afforded by Rule 26(b)(4)(B) [and] . . . there is no legal authority . . . for the premise that Rule

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provided this analysis, presumably because it concluded that it was in its interest to do so. It did this with full knowledge that the Government had no corresponding obligation to disclose its own experts' work product to Visa. To argue after the fact and without some prior agreement that some obligation should now be imposed on the Government in contravention of the clear legal authority to the contrary is absurd.

[32] 373 U.S. 83, 87 (1963).

[33] *Id*. The rule is an exception to the generally restrictive discovery rules governing criminal proceedings.

[34] *Martin v. Valley Nat. Bank of Arizona*, 1992 WL 196798 at *2 (S.D.N.Y.).

[35] *See, e.g., United States. v. 215.7 Acres of Land*, 719 F. Supp. 273 (D. Del. 1989) (analyzing, in the context of Rule 26(b)(4)(B), whether the Government must produce report from non-testifying expert); *United States v. John R. Piquette Corp.*, 52 F.R.D. 370 (E.D. Mich. 1971) (same).

26(b)(4)(B)'s pro[tection] does not apply to the Government."[36]

Finally, Visa argues that despite the mass of legal precedent to the contrary, it is nevertheless entitled to the Government's economic analyses because the Government's economic theory is somehow "novel" and "extraordinary." But there is nothing novel about the Government's theory.[37] It is Visa's argument — that the normal operation of the Federal Rules

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[36] 1992 WL 196798 at *2 (S.D.N.Y.). None of the cases cited by Visa involved Rule 26(b)(4)(B). Moreover, to the extent they purportedly apply *Brady* principles in civil actions, they are inapposite. In *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353-54 (6th Cir. 1993), the Sixth Circuit reasoned that *Brady* applied in the context of a denaturalization and extradition case only because the Government was seeking to denaturalize and extradite an alleged former concentration camp guard based on evidence of criminal acts, specifically mass murder. The court noted that "the consequences of denaturalization and extradition equal or exceed those of most criminal convictions." The court explicitly stated, however, that had the case truly been civil in nature, it would not have imposed *Brady* obligations on the Government. In *Pavlik v. United States*, 951 F.2d 220 (9th Cir. 1991), the court merely assumed, but did *not* decide, that *Brady* applied in civil context where government agency assessed civil fines for violating a federal statute. Defendants also rely on *E.E.O.C. v. Los Alamos Constructors, Inc*., 382 F. Supp. 1373 (D.N.M. 1974), which cited *Brady* in *dicta*, remarking that a defendant in civil cases brought by the government should be afforded the same "due process" as a criminal defendant.

[37] Numerous courts have recognized that limitations on quality, product improvements, and research and development — as well as effects on price and output — are bases for finding an antitrust violation. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 n.5 (1988) (noting that deterioration in product quality as a result of anticompetitive horizontal restraints can be the basis of an antitrust violation); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them."). Indeed, in an antitrust case filed against Visa by Discover, Visa successfully advanced the argument that competition — including competition to innovate — among general purpose card networks, as opposed to competition among card issuers, is important to consumers. *SCFC ILC, Inc. v. Visa U.S.A.*, 36 F.3d 958 (10th Cir. 1994). Visa argued that Discover's claim should be rejected, in part, because of the importance of preserving competition in the anemic network card market, arguing that there were only four competitors and emphasizing the lack of competition between two of the four competitors — Visa and MasterCard. For example, Visa International's Executive Vice President and General Counsel testified: "[O]ur industry is very small in the sense of we only have three basic competitors in it.

of Civil Procedure should be abrogated in this case — that is truly "novel" and in fact very dangerous. Allowing Visa to discover the internal Government analyses that it seeks would upset long-standing principles governing the respective rights and obligations of each side in civil litigation, principles that have been developed and refined over many years in order to ensure a fair legal process likely to produce a just result.

B. The Material Generated by the Division's Internal Economists Is Protected by the Deliberative Process Privilege

The economic analyses prepared by Antitrust Division economists are also protected from disclosure by the deliberative process privilege. The deliberative process privilege protects from disclosure predecisional deliberative matters embodying opinions or recommendations generated in connection with Government policy and decision-making.[38] The privilege rests on the belief that "the efficiency of Government would be greatly hampered if with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'"[39] Without the privilege, "the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."[40]

We have Visa and MasterCard, and I think as I indicated the duality in that, and then we have American Express and Discover." Testimony of Bennett Katz at 537-39 (attachment 2 hereto).

[38] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 & n.19 (1975).

[39] *Hopkins v. U.S. Dep't of HUD*, 929 F.2d 81, 84 (2d Cir. 1991) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

[40] *Dudman Communications Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987) (citing legislative history to FOIA Exemption 5); *see A. Michael Piano*, 18 F.3d at 147 (FOIA Exemption 5 case). Interpretations of FOIA Exemption 5 are relevant to cases applying the deliberative process privilege, and vice versa. *Burka v. Dep't of HHS*, 87 F.3d 508, 516 (D.C. Cir. 1996); *EPA v. Mink*, 410 U.S. 73, 91-92 (1973).

To fall within the scope of the privilege, documents must be both predecisional and deliberative.[41] Documents that are "deliberative" reflect the give and take of the consultative process, and include, for example, materials that would reveal advisory opinions and recommendations.[42] The protection for "predecisional" documents ensures the confidentiality of subjective documents that "reflect the personal opinions of the writer rather than the policy of the agency," as well as documents that would "inaccurately reflect or prematurely disclose the views of the agency."[43]

The economic memoranda prepared by the Antitrust Division's economists fit squarely within the deliberative process privilege. Economists employed by the Antitrust Division play an integral role in conducting investigations into possible violations of the antitrust laws, evaluating the economic issues arising from the defendants' conduct, and making recommendations to decision makers, including the Assistant Attorney General, whether to charge companies or individuals with violations of the antitrust laws. (Declaration of Joel I. Klein ("Klein Dec.") ¶ 7; Declaration of George A. Rozanski ("Rozanski Dec.") ¶¶ 2-3). Prior to the filing of this case, the economists assisted the legal staff in investigating, developing evidence, and analyzing the competitive effects of the conduct at issue in the complaint. (Klein Dec. ¶ 8; Moltenbrey Dec.¶¶

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[41] *Local 3 v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

[42] *Hopkins*, 929 F.2d at 84; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[43] *National Wildlife Federation v. Forest Service*, 861 F.2d 1114, 1118-19 (9th Cir. 1988) (internal quotations omitted); *see Hopkins*, 929 F.2d at 84. Thus, the deliberative process privilege protects against confusing the issues and misleading the public by disseminating documents that suggest reasons and rationales for a course of action that were not in fact adopted or were not in fact the ultimate reasons for the agency's action. *Coastal States*, 617 F.2d at 866.

4, 6; Rozanski Dec. ¶¶ 5-6). Their analyses and recommendations are embodied in the memoranda listed and described in Schedule to the Declaration of Joel I. Klein. (*See* Klein Dec. ¶¶ 4-8).

Disclosure of the documents in question would clearly undermine the Division's ability to obtain candid opinions, recommendations and analyses concerning the economic issues the Division faces on a daily basis. Such candid opinions are a critical part of the process upon which the Assistant Attorney General relies in formulating his decision to bring suit. Division staff could hardly be expected to formulate their thoughts, opinions, and ideas in a forthright and open manner amongst themselves if those thoughts were subject to production once litigation commences. (Klein Dec. ¶¶ 9-11; Rozanski Dec. ¶ 8). The quality of Division decisions would consequently suffer drastically if such analyses were subject to disclosure on those very occasions when perceived antitrust violations have necessitated litigation.

Courts have consistently held that the deliberative process privilege precludes antitrust defendants from delving into the confidential decision-making process of the Government. For example, in *FTC v. Warner Communications, Inc.*,[44] the Court of Appeals for the Ninth Circuit held that the deliberative process privilege prohibited the defendants from obtaining staff memoranda from FTC economists that recommended against challenging the defendants' proposed merger. The court of appeals overturned the trial court's ruling on the merits of the case, holding that the lower court's reliance on the FTC's internal economic analysis was improper. The Ninth Circuit reasoned that compelling disclosure "almost certainly injures the quality of agency decision" and "encourages the Commission to have deliberative reports and

[44] 742 F.2d 1156 (9th Cir. 1984).

recommendations prepared only by those economists who will draw the conclusions sought by the Commission."[45] The court also found that "information regarding market structure and competitive effects was available to the defendants" so that they "had little need for the memoranda."[46]

Similarly, in *United States v. Farley*, the court held that:

> staff memoranda to senior agency officials with recommendations, legal interpretations and drafts of litigation documents [were] clearly part of the FTC's deliberations on the Farley matter and therefore exempt from production. . . . [I]f communications such as these were exposed the candor of Government staff would be tempered "with a concern for appearances * * * to the detriment of the decisionmaking process."[47]

Visa contends that the deliberative process privilege does not apply to factual materials, and that it is entitled to any factual analyses conducted by Division economists, as well as to any conclusions drawn by Division economists that might be "exculpatory." The deliberative process privilege does not extend to purely factual material in raw form that do not involve or reveal deliberative process. Where those facts are intertwined with deliberative or advisory matter so as to reflect staff judgment, however, the factual portions are protected from disclosure as well.[48] In *Montrose Chem. Corp. v. Train*, the court held that winnowing a complex and fact-intensive record down to a core group of selected material for review is protected deliberative process.

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[45] *Id*. at 1162.

[46] *Id.* at 1161-62.

[47] 11 F.3d 1385, 1389-90 (7th Cir. 1993) (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)).

[48] *EPA v. Mink*, 410 U.S. 73, 87, 90-91 (1973); *Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980); *Wolfe v. Dep't of Health and Human Services*, 839 F.2d 768 (D.C. Cir. 1988); *Mead Data Central v. Dep't of Air Force*, 566 F.2d 242, 257, 260-61 (D.C. Cir. 1977).

Accordingly, the selected but purely factual material was held to be protected from disclosure.[49] This conclusion is even stronger when "an alternative source of the facts is available," for, in that case, "what the litigants may be seeking are not really facts, but evaluation of facts or advice, which should not be subject to disclosure."[50]

The same is true here. The Division economists' memoranda reflect their opinions as well as the gathering and selecting of key facts, all of which are contained in documents that either (1) were produced by defendants, (2) were produced to defendants by the Government, or (3) are publicly available. (Moltenbrey Dec. ¶ 11). Such gathering and selecting is an essential component of the protected deliberative process (as well as constituting opinion work product), the results of which are not subject to production. In effect, Visa seeks documents revealing pre-decisional deliberative analyses, not factual evidence necessary to prove its case. Visa has all the "facts," not only from the documents already produced by the Government — but also from its own management and members — that it needs to permit its economists to conduct their own analyses. Therefore, what Visa really seeks is no more nor less than the Government's internal economists' evaluation of those facts. To this, it is not entitled under any conceivable legal theory.

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[49] *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974); *see Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537-40 (D.C. Cir. 1993)(holding privilege protects the extraction and organization of facts to suit a specific directive).

[50] *Montrose*, 491 F.2d at 71 n.42; *see FTC v. Bass Brothers*, 1984 WL 2952 (N.D. Ohio) (denying defendant access to a government staff economist's pre-complaint report based on the deliberative process privilege).

Conclusion

For the reasons set forth above, this Court should deny Visa's Motion to Compel. Visa's motion not only is directly contrary to the Federal Rules of Civil Procedure and case law but, if granted, would wreak havoc on the Government's prosecutorial efforts.

Respectfully submitted,

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